However, it is also clear from the legislative history that a company that used none of its own facilities would not be considered a competitor for purposes of applying Section 271.

> Nonetheless, the conference agreement includes the `predominantly over their own telephone exchange service facilities' requirement to ensure that a competitor offering service exclusively through the resale of the BOC's telephone exchange service does not qualify, and that an unaffiliated competing provider is present in the market.[21]

In extensions of remarks, Congressman W.J. (Billy) Tauzin indicated that Congress intended the Commission to

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> likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.

142 Cong. Rec. H1078, H1117 (daily ed. Jan. 31, 1996). The House Committee Report echos this refrain:

> The Committee does not intend that the competitor should have to provide a fully redundant facilities-based network to the incumbent telephone company's network, yet it is expected that the facilities necessary for a competitive provider will be present.

H.R. Rep. No. 104-204, at 77 (1995)(emphasis added).

[21] 142 Cong. Rec. H1078, H1117 (daily ed. Jan. 31, 1996).

establish guidelines relating to the satisfaction of the "predominantly over its own facilities" requirement.

> The phrase `predominantly over its own telephone exchange facilities' is intended to ensure that the competing provider is doing more than repackaging and reselling the services of the Bell company. The Commission will establish guidelines for determining whether the `predominantly' requirement of section 254(a)(2)(A) has been satisfied. It is my understanding that in setting forth these guidelines the Commission will consider only the local loop and switching facilities used by the competing provider to provide telephone exchange service. It is also my understanding that the competing provider will be deemed to be providing service `predominantly' over its facilities if more than 50% of the local loop and switching facilities used by the competing provider to provide telephone exchange service is owned by the competing provider or owned by entities not affiliated with the Bell company that is applying for interLATA authority.[22]

Thus, the legislative history suggests that there are portions of the analysis establishing that a carrier serves "predominantly over their own telephone exchange facilities . . ." that cannot be meaningfully determined on an case-by-case basis. The Commission should establish generic guidelines to identify what facilities-based competitors that will satisfy Section 271's requirements.

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[22] 141 Cong. Rec. E1699 (daily ed. Aug. 11, 1995) (statement of Rep. Tauzin) (emphasis added).

2. The Commission will have to consider the meaning and scope of its public interest responsibilities under Section 271.

Congress expressly stated that in addition to satisfying the specific conditions of Section 271(c)(1), the Commission may not grant Section 271 authorization to any BOC unless it finds that "the requested authorization is consistent with the public interest, convenience, and necessity."[23] This "public interest" language will be central to the Commission's implementation policies. Further, the Commission's public interest consideration with respect to Section 271 eventually will have to be consistent with changes in industry structure that will flow from other proceedings implementing the 1996 Act, such as comprehensive reform of access charges and universal service policy.

It would not be reasoned decision making for the Commission to determine, in the context of an isolated application, where the public interest lies in implementing Section 271. In similar circumstances, the courts have struck down agency decisions that did not evidence consideration of the broader context. For example, the D.C. Circuit remanded the

[23] 47 U.S.C. § 271(d)(3)(c).

Federal Trade Commission's ("FTC's") choice to rely on presumptions to implement statutory market dominance criteria of the Rail Reform Act due to the early stage of implementation of the statute at issue.[24] Similarly, the Commission is in the early stages of implementing the 1996 Act, with many aspects of the transition to competitive markets yet to be determined. To embark on a determinative course of action (such as permitting interLATA competition in Oklahoma, thereby removing the incentive to SBC to cooperate in allowing local service markets to become actually competitive) in the context of an isolated application is not consistent with reasoned decision making at this time.

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[24] The decision emphasized that presumptions might be appropriate but that at such an early stage in implementation, the FTC could not demonstrate that presumptions could or could not identify market dominance accurately.

> At this early stage in the implementation of the Reform Act, we cannot conclude -- nor has the FTC adduced evidence that would demonstrate -- that presumptions cannot, in practice, identify market dominance with fair accuracy in a substantial number of cases, thus promoting efficiency in accordance with the legislative mandate

See Atchison, Topeka & Sante Fe Ry. Co. v. Interstate Commerce Comm'n, 580 F.2d 623, 631 (D.C. Cir. 1978).

D. The broad language of the statute coupled with legislative history demonstrates the necessity for generic implementation of Section 271 through rulemaking rather than case-by-case determinations.

Congress anticipated that the Commission would establish clear guidelines for the implementation of Section 271. Although more than one reasonable approach to implementing Section 271 exists, and the Commission clearly possesses the authority to choose the program of implementation, TW Comm submits that comprehensive implementation of Section 271 is the only reasonable course. In part, the need for comprehensive implementation of Section 271 relates to the nature of the FCC's responsibilities under the Communications Act.[25]

If the Commission implements Section 271 in a careful

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[25] In a similar context, the D.C. Circuit has emphasized the need for the Commission to address its responsibilities regarding communications regulation comprehensively:

> Our evaluation of the Commission's interpretation of the scope of its jurisdiction must take into account the Act's broad purposes and objectives. We cannot ignore specific exemptions and limitations which narrow its regulatory power .... The act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole.

General Tel. Co. v. FCC, 413 F.2d 390, 398 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1969) (emphasis added).

and comprehensive manner, such as a rulemaking rather than case-by-case adjudication, it will accomplish the following: (1) significantly decrease the risk that its implementation of Section 271 will violate other provisions of the statute and (2) substantially decrease the risk that its implementation of Section 271 will result in subsequent changes to its policies that a court could conclude were arbitrary and capricious.

The Commission will achieve the best results by developing a coherent and reasoned pattern of applications related to the general purpose of the Communications Act.

> [A]ny agency's primary mission is to create a coherent national benefit or regulatory program by adopting a combination of statutory constructions that will allow the agency to perform its prescribed mission in a reasonably efficient and effective manner. The construction of a statute must be functionally related, i.e., only some combinations will allow the agency to implement a coherent program.[26]

The Commission's efforts at interpreting Section 271 should reflect that Section 271 serves the ultimate competitive

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[26] Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, 95 Colum. L. Rev. 749, 754 (May 1995). See also Eben Moglen and Richard J. Pierce, Jr., Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation, 57 U.Chi. L. Rev. 1203, 1240 (Fall 1990)("[S]tatutory interpretation frequently is contingent on the other policies the agency adopts to implement the regulatory system.").

objectives of the Communications Act because the interrelated sections of the Communications Act constitute a comprehensive and effective regulatory scheme.[27] Thus, the Commission should attempt to interpret Section 271 in a manner that considers its relation not only to the immediate purpose of that section of the statute - BOC entry into the interLATA market - but also to related purposes such as universal service reform and interconnection, as well as its role in the Commission's implementation of the competitive goals of the entire Communications Act.

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[27] As the District of Columbia Circuit recognized,

> The Supreme Court has reminded us that, in employing traditional tools of statutory construction, we must consider the language and overall structure of a statute, and its legislative history, to determine congressional intent. This is a common-sense approach to statutory construction . . . .

Regular Common Carrier Conference v. Interstate Commerce Comm'n, 820 F.2d 1323, 1331 (D.C. Cir. 1987)(citations omitted). Similar theories have been discussed in journal articles. See, e.g., Neil Duxbury, Faith in Reason: The Process Tradition in American Jurisprudence, 15 Cardozo L.Rev. 601, 664-70 (Dec. 1993)(discussing argument that workable theory of statutory interpretation can only be formulated by developing coherent and reasoned pattern of applications intelligibly related to general purpose of statute); Veronica Dougherty, Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation, 44 Am. U.L.Rev. 127, 160-61 (Fall 1994).

Implementation of Section 271 in a rulemaking proceeding will substantially decrease the risk that the FCC's implementation of Section 271 also will result in the need for subsequent changes to its policies that a court could conclude were arbitrary and capricious.[28]

In its efforts to implement the Act in a consistent manner, the Commission should evaluate the entire Section 271 process comprehensively before it grants any BOC Section 271 authority. The 90 day statutory deadline for a Commission response to a Section 271 application mandated by Section 271(d)(3), 47 U.S.C. § 271(d)(3), does not provide sufficient time for the Commission to evaluate the Section 271 process - a case of first impression - to the adequate degree. Comprehensive evaluation of Section 271 would necessarily include a thorough examination of the Commission's ongoing responsibilities under that Section. To date, the Commission's analysis of Section 271

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[28] As the Supreme Court has emphasized,

> [A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.

Motor Vehicle Mfrs Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 41-42 (1983)(emphasis added).

has not included a thorough examination of its ongoing responsibilities under that Section.[29]

Section 271(d)(6), 47 U.S.C. § 271(d)(6), expressly provides that if a BOC with Section 271 authority fails to satisfy the conditions required for that approval on an ongoing basis, following notice and an opportunity for a hearing, the Commission may require the BOC to correct the deficiency, penalize the company, or suspend or revoke the approval.[30] Thus,

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[29] Specifically, in the First Report and Order the Commission did not - and did not intend to - engage in an exhaustive analysis in order to interpret the provisions of Section 271 or to consider its implementation on an ongoing basis. The Commission's December 6, 1997 Public Notice regarding Section 271 set forth certain requirements and policies for processing BOC Section 271 applications but did not interpret the statute for other purposes. Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act, FCC 96-469 (rel. Dec. 6, 1996). Further, the Commission limited its consideration of Section 271 in its most recent issuance to classify BOC interLATA affiliates and independent LECs as non-dominant carriers in the provision of in-region long distance service. In re Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61 (April 18, 1997).

[30] From TW Comm's perspective, ongoing monitoring of BOCs authorized under Section 271 is crucial to the effective implementation of the 1996 Act. At present, it is difficult for CLECs to negotiate with BOCs, as evinced by the numerous ongoing interconnection arbitrations taking place at the state level. The BOCs appear to be engaging in foot-dragging behavior even

to decrease the risk that implementation of Section 271 will result in the need for subsequent changes to its policies that could constitute arbitrary and capricious inconsistencies, at a minimum the FCC should consider the following items in a thorough fashion before it provides any Section 271 applications: (1) FCC complaint procedures to hear complaints under that Section and (2) exit procedures.[31] The Commission should establish such expedited complaint procedures as well as substantive rules to define the specific legal elements of a claim that a BOC failed to meet or no longer meets Section 271 requirements before it approves any BOC's Section 271 application.

An expedited complaint process would be an integral

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with Section 271 serving as an incentive to act in a competitively neutral manner. Without that incentive, one would expect the BOCs to be even less flexible in negotiations. The potential harm of rushing to a judgment on competitive issues based on the Application is much greater than any reduction in administrative burden that could result from considering these issues after the FCC considers ongoing enforcement of Section 271.

[31] Although the Commission did address generic complaint procedures relating to claims that a BOC no longer met the Section 271 conditions for entry, the FCC expressly left for subsequent consideration the adoption of expedited complaint procedures and substantive rules to define the specific legal elements of a claim that a BOC has failed to meet, or no longer meets, Section 271 conditions. First Report and Order at para. 337.

part of any Commission effort to implement Section 271 in a comprehensive manner. Consideration of what remedies it will use upon completion of its complaint process or upon completion of an FCC initiated review process should also be part of a reasoned implementation of its responsibilities. Most importantly, a clear indication from the Commission to applicants that the FCC will retain the authority to revoke Section 271 authority would decrease the possibility that a future need for subsequent changes to FCC policies that a court could conclude were arbitrary and capricious.[32]

II. THE DEFECTS IN THE APPLICATION IDENTIFIED IN THE APRIL 23RD MOTION JUSTIFY DISMISSAL AS ALTS HAS PROPOSED

TW Comm associates itself fully with the arguments presented in the ALTS April 23rd Motion and urges the Commission to grant the relief requested in the Motion. Even if SBC's claim that Brooks serves a handful of customers is true - and the April 23rd Motion as well as Brooks' April 28, 1997 comments regarding

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[32] Understandably, however, Section 271 authority, once granted, will be difficult to revoke. Revoking Section 271 authority may result in BOC arguments based on theories of stranded investment and detrimental reliance. One approach would be for the Commission to require a BOC to file a statement conceding in advance that in the event of a suspension or revocation of its Section 271 authority it will not be able to recover "stranded investment" or seek provisional remedies and will be held financially responsible to educate consumers.

the April 23rd Motion provide the Commission with compelling arguments that SBC's representations regarding such service are inaccurate - service to a handful of customers constitutes the mere possibility of developing competition rather than the indicia that competition actually exists.

The promise of competition does not satisfy the Competitive Checklist of Section 271 and is devoid of any shred of plausibility in light of the clearly expressed pro-competitive policies underlying the 1996 Act. Before granting any BOC Section 271 authority, the Commission should be certain that the BOC at issue - in this instance SBC - is confronted with actual facilities-based competition, rather than simply the potential for competition. Such a conclusion is supported by the difficulties CLECs are experiencing when seeking to become operational by relying in part on services provided by BOCs. The BOCs appear to be engaging in foot-dragging behavior even with Section 271 serving as an incentive to act in a competitively neutral manner. Without that incentive, one would expect the BOCs to be even less flexible.

The FCC cannot solely rely upon the existence of signed interconnection agreements as proof of BOC attainment of the

Section 271 long-distance entry conditions. BOCs must also be required to demonstrate that they are operationally capable of meeting their obligations, which can only be demonstrated through the presence of sufficient facilities-based competition in BOC markets. Whether SBC is facing sufficient competition remains unresolved. Further, even if Brooks is providing sufficient service in Oklahoma (an issue still uncertain), the April 23rd Motion and Brooks' April 28, 1997 comments supporting the same indicate that such service might very well be provided over resold facilities.[33] Thus, whether SBC faces a facilities-based competition is also uncertain.

SBC relies on Brooks' service offerings to demonstrate that competing providers in the relevant markets serve both residential and business customers.[34] ALTS's April 23rd Motion, a March 4, 1997 letter from Brooks to SBC as well as Brooks' April 28, 1997 comments filed in support of the April 23rd Motion question whether Brooks is serving any residential customers in the fashion that Section 271 contemplates.[35] The fact that

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[33] ALTS April 23rd Motion at 8 n.8.

[34] SBC Brief at 11.

[35] Letter from Edward J. Cadleux, Director, Regulatory Affairs - Central Region, Brooks Fiber Properties to Martin E.

Brooks may not be providing competitive service in the manner it represents in the Application is fatal to the Application. Without operational competitors, SBC is simply not confronted with competition and the Application cannot satisfy Section 271.

SBC also attempts to argue that it qualifies for Section 271 authority pursuant to Track B. However, it is clear that in this instance, under 47 U.S.C. § 271(c)(1)(A), SBC must comply with the requirements generally referred to as "Track A". Put simply, as Brooks states in its April 28, 1997 comments, it requested interconnection with SBC in March of 1996. Accordingly, SBC may not choose to pursue Track B unless Brooks has failed to negotiate in good faith or violates the implementation schedule for the interconnection agreement at issue. There is no demonstration that either of these events has occurred. Further, SBC itself represents that it has "sixteen negotiated interconnection and resale agreements, of which six have been approved by the OCC pursuant to section 252(e) of the

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Grambow, Vice President and General Counsel, SBC Telecommunications, Inc. (March 4, 1997); Comments of Brooks Fiber Properties, Inc. in Support of Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services, CC Docket No. 97-121 (April 28, 1997).

Communications Act."[36] Accordingly, it is without question that because competitive providers have sought interconnection with SBC under Track A and SBC has not demonstrated those competitive providers' failure to negotiate in good faith or violation of the implementation schedule for the interconnection agreements at issue, the Track B approach is simply unavailable to SBC in Oklahoma.[37]

It is also apparent that the Application fails to meet the requisite burden of proof and is deficient as a matter of law and as a matter of fact. As the proponent of agency action, SBC has the burden of proof under a preponderance of the evidence standard, unless otherwise provided by statute.[38] However, on virtually all of the major points previously addressed herein, particularly regarding the policy choices the Commission must make and the development of actual, rather than theoretical,

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[36] SBC Brief at 4.

[37] Because SBC does not qualify for Track B in Oklahoma, it is impossible for SBC to rely on its statement of generally available terms and conditions for interconnection and access ("Statement"), filed with the OCC, to satisfy Section 271's requirements. Accordingly, the entirety of SBC's discussion of the Statement should be disregarded.

[38] See, e.g., 5 U.S.C. §556(d); Steadman v. Sec. Exch. Cmm'n., 450 U.S. 91 (1981).

competition, the Application is resoundingly silent. Put simply, SBC has failed to demonstrate that actual competition resulting in real customer choice exists in the markets at issue. The FCC has recognized that the allocation of the burden of proof defaults to the proponent of the proceeding when Congress does not specify otherwise.[39] Absent a showing of actual customer choice, SBC, the proponent of agency action, fails to meet the burden of proof.

SBC offers virtually nothing beyond bare assertions that would permit evaluation of whether the agreements SBC points to meet the relevant statutory standards. Any such evaluation becomes even more crucial because, as noted above, it is necessary to contemplate the revocation of Section 271 authority before it can be granted.[40] The Commission cannot permit this plainly deficient Application to stampede it into hurried regulatory action that may ultimately prove ill-considered.

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[39] General Plumbing Corp. v. New York Tel. Co. and MCI Telecommun. Corp., 11 FCC Rcd. 11799 (1996)(citing Maine v. U.S. Dept. of Labor, 669 F.2d 827, 829 (1st Cir. 1982)).

[40] Such revocation may, in fact, be necessary if the Eighth Circuit's decision changes the factors that went into the Commission's Section 271 analysis. TW Comm does not suggest that access charge and universal service reform must precede Section 271 approval; only that the agency must take reasonable steps to effectuate consistency.

CONCLUSION

For the foregoing reasons, the Application for Section 271 Authority in Oklahoma, submitted on April 11, 1997 should be, in all respects, DENIED.

Respectfully submitted,

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Dated May 1, 1997

CERTIFICATE OF SERVICE

I, Catherine P. McCarthy, hereby certify that a true and correct copy of the foregoing Comments of Time Warner Communications Holdings, Inc. was served, this 1st day of May, 1997, via overnight mail or hand-delivery as indicated, to the following:

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